Petition

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No. 81-763

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARTIN KATZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

1(A) Where defendant was charged with burglary of a 1977 Buick and the evidence showed that the car in question was a 1975 Chevrolet, and, upon defendant's non-specific motion to dismiss at the close of the evidence, the trial court entered judgment of acquittal specifically on grounds of the said variance, is defendant thereafter protected by the prohibition against double jeopardy (including principles of collateral estoppel) from a second prosetution upon an Information which conforms to the proof adduced at the first trial?

1(B) Does the constitutional prohibition against double jeopardy permit a defendant to twice be prosecuted for essentially the same offense, if only the prosecution makes a mistake in the first charging document?

Parties Involved

Petitioner, Martin Katz, was the defendant in the trial court, the appellee in the District Court of Appeal, and the respondent in the Supreme Court of Florida. Respondent, the State of Florida, was the prosecution in the trial court, the appellant in the District Court of Appeal, and the petitioner in the Supreme Court of Florida.

State of Florida v. *Alfred Witherspoon*, No. 56,169, was consolidated with Katz' case, No. 57,227, by order of the Florida Supreme Court on December 10, 1979, on the State's motion and over Katz's objection. Defendant's case and Katz' are not factually related, but were heard together in the Supreme Court of Florida solely on grounds they involved the "same legal issue."[1]

Hereafter, petitioner Katz will be referred to as defendant or Katz.

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[1] As stated in the per curiam opinion of the Supreme Court of Florida, App. A, p. 1:

> "Although [the Witherspoon and Katz cases were] prosecuted separately in both the trial courts and district court of appeal, they have been consolidated for purposes of review in this Court as involving the same legal issue."

Witherspoon has filed his Petition for Certiorari in this court under No. 81-5496, 9/28/81.

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Defendant's first trial resulted in a bench finding of "not guilty" at the close of all the evidence upon defendant's general motion for acquittal, where the information charged him with burglary of a 1977 Buick and the evidence showed (if anything) conduct with respect to a 1975 Chevrolet. Upon his attempted reprosecution on an information which conformed to the proof adduced at the first trial, the trial court dismissed all charges. The order of the district court of appeal, affirming such dismissal, was correct and should be affirmed. The judgment of the Supreme Court of Florida, quashing the district court's order and remanding with instructions to reverse the order of the trial judge dismissing the information, violates defendant's federally protected right against double jeopardy.

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Where a defendant is acquitted because the proof fails to sustain the allegations, the prohibition against double jeopardy must be held to bar retrial on the basis of corrected allegation just as it bars retrial on the basis of augmented proof.

The Supreme Court of Florida's decision allowing retrial on these facts should be scrutinized by this Court on certiorari, for it emasculates long-standing concepts of double jeopardy, and misinterprets, misapplies and disregards constitutional mandates of this Court dating back to *Ball* v. *United States*, 163 U.S. 662 (1896) 4

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In the Supreme Court of the United States

OCTOBER TERM, 1981

NO.

MARTIN KATZ,

Petitioner,

VS.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Martin Katz, (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the Supreme Court of Florida, to review its decision quashing the decision of the Third District (Florida) Court of Appeal and remanding to that court with instructions to reverse the order of the trial judge dismissing the information.

Judgments and Opinions Below

The Per Curiam opinion, not yet reported, No. 57,227, is set out as Appendix A, per Rule 21.1(k)(i) of this Court. The dissenting opinion of Justice Boyd is set out as App.

B. The opinion of the District Court of Appeal (affirming the trial court's order dismissing the information), is published at 372 So.2d 201 (Fla. 3d Dist. Ct. App. 1979). A copy is appended as App. D, per Rule 21.1(k)(ii).

Jurisdictional Statement

On July 30, 1981, the Supreme Court of Florida entered its order quashing the decision of the Third District (Florida) Court of Appeal and remanded to that court with instructions to reverse the order of the trial judge dismissing the information. (App. A) Defendant's timely petition for rehearing was denied on September 24, 1981. (App. C) This petition to review the judgment of a state court of last resort in a criminal case is timely filed within 60 days after the date of denial of rehearing, as provided in Rule 20.1 & .4. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED[2]

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1 . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

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[2] There is no issue in this Petition as to the interpretation of any statute. The offense with which defendant was charged was "burglary of a conveyance."

STATEMENT OF THE CASE

Statement of Facts

The original information alleged burglary of a conveyance, with respect to a 1977 Buick alleged to be the property of one, Mike Albury. Per the evidence adduced at trial, the car described in the information, that is, a 1977 Buick, belonged to defendant Katz' wife, whereas defendant's alleged conduct was with respect to a 1975 Chevrolet belonging to Albury. *State* v. *Katz*, 372 So.2d at 202.

The following is from the per curiam opinion, App. A, p. 2:

"In *Katz* one count of the information charged burglary of a conveyance, 'to-wit: A 1977 BUICK AUTOMOBILE.' At trial the evidence revealed that the stolen vehicle was in fact a 1975 Chevrolet. At the close of the evidence the defendant moved to dismiss all charges. The court observed that defendant had been charged with 'breaking into his own car' and granted the motion. The second *Katz* information tracked the first as to the burglary charge, except that the stolen vehicle was described as 'a 1975 Chevrolet.' The court dismissed this information on the basis of collateral estoppel citing *Ashe* v. *Swenson*, 397 U.S. 436 (1970), and the district court affirmed."

Nature of the Case

After the trial court dismissed the second information, the State appealed, and the Third District (Florida) Court of Appeal affirmed dismissal. (App. D) *State* v. *Katz*, 372 So.2d 201 (Fla. 3d Dist. Ct. App. 1979). On certiorari sought by the State, the Supreme Court of Florida quashed the District Court's decision and remanded to that court with instructions to reverse the order of the trial judge dismissing the information. (App. A)

REASONS FOR GRANTING THE WRIT

Defendant's first trial resulted in a bench finding of "not guilty" at the close of all the evidence upon defendant's general motion for acquittal, where the information charged him with burglary of a 1977 Buick and the evidence showed (if anything) conduct with respect to a 1975 Chevrolet. Upon his attempted re-prosecution on an information which conformed to the proof adduced at the first trial, the trial court dismissed all charges. The order of the district court of appeal, affirming such dismissal, was correct and should be affirmed. The judgment of the Supreme Court of Florida, quashing the district court's order and remanding with instructions to reverse the order of the trial judge dismissing the information, violates defendant's federally protected right against double jeopardy.

Where a defendant is acquitted because the proof fails to sustain the allegations, the prohibition against double jeopardy must be held to bar retrial on the basis of corrected allegations just as it bars retrial on the basis of augmented proof.

The Supreme Court of Florida's decision allowing retrial on these facts should be scrutinized by this Court on certiorari, for it emasculates long-standing concepts of double jeopardy, and misinterprets, misapplies and disregards constitutional mandates of this Court dating back to Ball v. United States, 163 U.S. 662 (1896).

In an opinion portending grave repercussions for the ordered administration of criminal justice, a majority of the Supreme Court of Florida has decided that defendant *can* twice be prosecuted for essentially the same offense,

if only the State has made a mistake in the first charging document. The outcome of this precedent-shattering opinion is that a defendant no longer has any protection from the authorities successively charging him with multiple formal prosecutions for the self-same conduct. This decision emasculates the double jeopardy prohibition of the United States Constitution.

The decision reversing defendant's acquittal here—that is, allowing the government a "second chance" at him after having incorrectly drafted the original charging document—gives the prosecution *carte blanche* to disregard its obligations, and makes a mockery of the principles embodied in the Double Jeopardy clause, by permitting blanket reprosecution of individuals whose initial prosecution was marred by a fatally defective charging document.

In the words of the per curiam decision of the Florida Supreme Court, App. A, p. 2:

> "[T]he information charged burglary of a conveyance, 'to wit: A 1977 BUICK AUTOMOBILE.' At trial the evidence revealed that the stolen vehicle was in fact a 1975 Chevrolet. At the close of the evidence the defendant moved to dismiss all charges. The court observed that defendant had been charged with 'breaking into his own car' and granted the motion. The second *Katz* information tracked the first as to the burglary charge, except that the stolen vehicle was described as 'a 1975 Chevrolet.' The court dismissed this information on the basis of collateral estoppel citing *Ashe* v. *Swenson,* 397 U.S. 436 (1970), and the district court affirmed."

Per the evidence adduced at trial on the original information, the car described in that information, a 1977 Buick, belonged to defendant Katz' wife, while defendant's alleged conduct was with respect to a 1975 Chevrolet belonging to one, Mike Albury. *State* v. *Katz,* 372 So.2d at 202. (Dist. Ct. App.)

Utilizing a test for all intents and purposes identical to that set out in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the Supreme Court of Florida phrased it thus:

> "Florida's test for determining whether successive prosecutions impermissibly involve the same offense is based upon the sufficiency of the allegations in the second information with regard to a conviction of the offense charged in the first. If the facts alleged in the second information, taken as true, would have supported a conviction of the offense charged in the prior information, the offenses are the same and the second prosecution is barred." (App. A, p. 3)

The Florida Supreme Court recognized that defendant did not affirmatively seek dismissal or judgment of acquittal based upon the variance: "The trial judge acted *sua sponte* to dismiss the first *Katz* information, but the acquittal was unquestionably founded upon the discrepancy between a 1977 Buick and a 1975 Chevrolet." (App. A, p. 5)

Here, where defendant *Katz* did not actively seek acquittal on grounds of the variance between the first information and the proof adduced at trial, it is unconscionable to subject him to the agony and expense of a second trial occasioned by the prosecution's careless mis-drafting of the initial charging document.

As put by Justice Boyd, dissenting:

> "To be accused of crime and subjected to a criminal trial is a devastating ordeal. Even where the accused is acquitted of the crime, the burdens of the experience may and often do involve severe embarrassment, psychological damage, and financial ruin. Therefore, the Double Jeopardy Clause demands that the government be allowed but one opportunity to prove a criminal accusation.
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> * * *
>
> "One of the most awesome powers exercised by officials of the state is the power . . . to institute crimi-

> nal proceedings by accusing a person of the commission of a crime. . . . *The constitutional prohibition against allowing the state a second opportunity to prove the commission of a crime* should extend to situations such as the present cases and *should be held to require that when accusatory pleadings are being drafted, they be drafted correctly.* If the proof at trial fails to sustain the allegations, retrial should no more be permitted on the basis of corrected allegations than it is on the basis of augmented proof." App. B, p. 9) (Emphasis added.)

The majority of the Supreme Court of Florida has strictly applied its "same offense" test, so as to hold that, per *State* v. *Beamon,* 298 So.2d 376 (Fla. 1974), "a defendant . . . is estopped to suggest that the variance which was material enough for acquittal is nonetheless immaterial for a new charge," (App. A, pp. 6-7); in other words, if the variance required acquittal, then the new charge redrafted to conform to the evidence adduced at the original trial is *not* the same charge as that of which defendant was acquitted, and double jeopardy does not bar retrial.[3]

On the facts here, this strained and formalistic approach does violence to evolving concepts of due process as encompassing double jeopardy principles, and should be eschewed by this Court.

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[3] The *Beamon* rule, insofar as it may be held to require a defendant to forego reliance on one constitutional right (*i.e.,* right not to be convicted upon less than proof beyond a reasonable doubt of all the elements alleged in the charge) in order to assert another (double jeopardy on subsequent trial), runs afoul of this Court's pronouncement that

> "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons* v. *United States,* 390 U.S. 377, 384 (1968).

The prohibition against double jeopardy emanates from the common law, as originally formulated and set down in England as early as 1796. See *Rex* v. *Vandercomb*, 2 Leach 708, 168 Eng. Rep. 455 (1796). In *Ball* v. *United States*, 163 U.S. 662, 655-71 (1896), Your Honors' predecessors held that a new prosecution brought after an acquittal under a defective indictment was barred by the double jeopardy clause.

The Due Process Clause of the Fourteenth Amendment requires that the Fifth Amendment's double jeopardy clause applies as against the States. *Benton* v. *Maryland*, 395 U.S. 784 (1969).

Bretz v. *Crist*, 546 F.2d 1336, 1339 (9 Cir. 1976), *aff'd*, 437 U.S. 28 (1978), lends support to defendant's position herein. There, a typographical error regarding the date of the offense resulted in an allegation that the offense occurred after the applicable prohibitory statute had been repealed. Once jeopardy attached, held the Court of Appeals, acquittal even upon such a defective information barred defendant's subsequent prosecution for the same offense upon a corrected indictment. This Court's holding, affirming the result, involved the time when jeopardy attaches, and left intact the above-noted aspect of the Court of Appeals' decision. The appeals court had stressed that the former acquittal was occasioned by action of the trial court *sua sponte*—as at bar—not on the defendant's motion based on such grounds. *Bretz* v. *Crist*, *supra*, 546 F.2d at 1339 n.2.

United States v. *Sorenson*, 504 F.2d 406 (7 Cir. 1974), dismissed the government's appeal from the trial court's order granting defendant's motion of judgment of acquittal where the prosecution failed to prove an essential element of the crime (that defendant had previously been convicted of a felony), holding that under double jeopardy principles, the government's failure to prove an essential

element of the offense precluded the government's appeal. Similarly, at bar, the State failed to prove an element of the originally charged offense, namely, the description of the property alleged to have been involved. And similarly, here, double jeopardy principles ought to bar the second trial.

* * *

Recent federal cases clarify that the "collateral estoppel" basis of *Ashe* v. *Swenson*, 397 U.S. 436, 25 L.Ed.2d 469 (1970), is not the sole aspect of the "double jeopardy" defense; rather, that doctrine (*i.e.*, that facts necessarily determined in first proceeding may not be relitigated against defendant in subsequent proceeding) is but one portion of a greater collection of rights within the protection of the prohibition against former jeopardy. Once this is properly perceived, then, even if the *Ashe* v. *Swenson* "collateral estoppel" test may be inapplicable here,[4] because of the faulty description of the vehicle in the first information, other aspects of the federally guaranteed prohibition against double jeopardy dictate that the lower courts' orders here in defendant's favor should be upheld. Your Honors in *Ashe* v. *Swenson* expressly recognize that collateral estoppel is but one of the factors embraced by "double jeopardy," a more inclusive concept. 397 U.S. at 445-46.

In addition to the traditional notions of what is involved in a double jeopardy defense, including collateral estoppel, a discrete consideration is "whether the accused has twice been put to trial." *Pettyjohn* v. *Evatt*, 369 F. Supp. 865 (E.D. Tenn. 1974), *aff'd* (without opinion), 500 F.2d 1403 (6 Cir. 1974).

The doctrine of double jeopardy includes not merely a prohibition against twice prosecuting a person for the same

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[4] See App. A, p. 5.

crime, but also proscribes twice prosecuting him on the basis of the same factual contentions, albeit for different crimes. *United States ex rel. Triano* v. *Superior Court of New Jersey Law Division*, 393 F. Supp. 1061 (D.N.J. 1975), *aff'd* (without opinion), 523 F.2d 1052 (3 Cir. 1975).

As the Court of Appeals for the Fifth Circuit has noted, collateral estoppel is *part* of the double jeopardy guarantee; not necessarily limited thereto. *Hutchings* v. *Estelle*, 564 F.2d 713, 714 (5 Cir. 1977). Other cases holding that there is more to double jeopardy than merely the "collateral estoppel" aspect thereof include *Blackburn* v. *Cross*, 510 F.2d 1014, 1017 (5 Cir. 1975), and *Wingate* v. *Wainwright*, 464 F.2d 209 (5 Cir. 1972), where the Court of Appeals extended the *Ashe* v. *Swenson, supra*, holding to include evidentiary facts established at the first trial, as well as "essential elements" facts.

Per this Court, one of the interests protected by the double jeopardy clause is "the minimization of harassing exposure to the harrowing experience of a criminal trial . . ." *Bretz* v. *Crist, supra*, 437 U.S. at 38.

* * *

A recent decision involving double jeopardy in the multiple-sovereign situation removes any validity there may yet have been to Florida's extremely strict "same offense" aspect of its double jeopardy rule.[5] In *Waller* v. *Florida*, 397 U.S. 387 (1950), this Court held that a defendant who had been convicted in municipal court for destruction of city property and disorderly breach of peace in violation of city ordinances could *not* be retried by the State on a charge of grand larceny based on the same acts as were involved in violation of the ordinances; the second trial constituted double jeopardy.

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[5] See footnote 3, *supra*, p. 7, and accompanying text.

While we maintain that the trial court's action below was correct (both in reaching the original "not guilty" finding and in sustaining defendant's plea of former jeopardy prior to commencement of the second trial), to the extent that it may be urged or determined that the order finding defendant not guilty at the first trial is erroneous, even this should not affect the propriety of his otherwise valid double jeopardy plea. In *Arizona* v. *Washington,* 434 U.S. 497 (1978), this Court held that the constitutional protection against double jeopardy prohibits a second trial following acquittal, even if the acquittal was based on an egregiously erroneous foundation. Similarly, in *Sanabria* v. *United States,* 437 U.S. 54 (1978), this Court held that once a defendant has been acquitted, no matter how egregiously erroneous the legal rulings leading to the judgment of acquittal may be, there is no exception to the constitutional rule forbidding successive trials for the same offense. See also *Hudson* v. *Louisiana,* ..... U.S. ....., 67 L.Ed.2d 30 (1981); *United States* v. *Dinitz,* 424 U.S. 600, 611 (1975); *compare United States* v. *Cyphers,* 553 F.2d 1064, 1068 n.1 (7 Cir. 1977).

In this Court's recent decision of *Hudson* v. *Louisiana, supra,* Your Honors held that a second trial following a state trial court's grant of a new trial on grounds that the evidence was insufficient to support the jury verdict was barred by the double jeopardy clause. We find it conceptually impossible to distinguish between this situation and that at bar, where, too, the evidence (that a 1975 Chevrolet was involved) failed to support the charge (involving a 1977 Buick). (See dissenting opinion).

As easy as it is for prosecutors to press charges nowadays, there must be a limit to bringing a defendant before the bar to answer for a single course of conduct. *Cf.* the modern practice to charge a number of separate offenses

based on a single set of facts. Given these circumstances, it is not asking too much to require that a defendant properly be charged with the offense with which the prosecution intends to charge him, and that if, as here, the charging document is so erroneous that the evidence fails to prove the offense charged, double jeopardy must forbid his being again brought to trial on a corrected charge for the exact same conduct.

* * *

The anti-double jeopardy principles forbidding harassing multiple prosecutions for the same conduct must apply here, if they ever apply; else the "potential for oppression when the government is allowed successive attempts to prove the commission of a crime" (App. B, p. 8) is realized and we may as well be living in a totalitarian state.

Certiorari should be allowed so that this Court may hold that the constitutional prohibition against double jeopardy extends to the present case and "require[s] that when accusatory pleadings are being drafted, they be drafted correctly." (App. B, p. 9) This Court should address itself to the underlying purposes of the constitutional prohibition, espouse the principles of the cases cited herein, and hold on the merits that here, defendant's second trial is barred.

CONCLUSION

For the reasons expressed herein, the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA

No. 57,227
and
No. 56,169

STATE OF FLORIDA, Petitioner,

vs.

MARVIN KATZ, Respondent.

STATE OF FLORIDA, Petitioner,

vs.

ALFRED WITHERSPOON, Respondent.

[July 30, 1981]

PER CURIAM.

By petitions for writs of certiorari the state seeks review of two decisions, *State* v. *Katz*, 372 So.2d 201 (Fla. 3d DCA 1979), and *State* v. *Witherspoon*, 366 So.2d 487 (Fla. 3d DCA 1979), which allegedly conflict with prior decisions of this Court. Art. V, § 3(b)(3), Fla. Const. Although prosecuted separately in both the trial courts and district court of appeal, they have been consolidated for purposes of review in this Court as involving the same legal issue.

The question presented is whether a defendant who obtains a judgment of acquittal on the grounds that a material variance existed between the allegations in the information and the proof adduced at trial is thereafter protected by double jeopardy or collateral estoppel from a

second prosecution based upon an information which conforms to the proof adduced at the first trial.

In *Katz* one count of the information charged burglary of a conveyance, "to-wit: A 1977 BUICK AUTOMOBILE." At trial the evidence revealed that the stolen vehicle was in fact a 1975 Chevrolet. At the close of the evidence the defendant moved to dismiss all charges. The court observed that defendant had been charged with "breaking into his own car" and granted the motion. The second *Katz* information tracked the first as to the burglary charge, except that the stolen vehicle was described as "a 1975 Chevrolet." The court dismissed this information on the basis of collateral estoppel citing *Ashe* v. *Swenson,* 397 U.S. 436 (1970), and the district court affirmed.

In *Witherspoon* the first information, as limited by a statement of particulars, alleged that the crime occurred on November 19, 1976, "at approximately 8:00 P.M." At trial, the proof indicated the actual time was dusk or nightfall which occurred around 5:30 P.M. on that date. The defendant claimed the variance was material and prejudicial in light of his alibi defense and successfully moved for a judgment of acquittal. Predictably the next information alleged the crime occurred on November 19, 1976, "at dusk, to-wit: between 6:00 P.M. 8:00 P.M." This information was dismissed by the trial court as barred by the prohibition against double jeopardy. The district court affirmed.

In both *Katz* and *Witherspoon* Judge Hubbart dissented, citing our decision in *State* v. *Beamon,* 298 So.2d 376 (Fla. 1974), *cert. denied,* 419 U.S. 1124 (1975). In *Beamon* the first information, as limited by a bill of particulars, specified November 24, 1972, as the date of the offense. Proof at trial showed that November 26, 1972, was the actual date. The court granted a judgment of acquittal on the

basis of the variance and declared the defendant "not guilty of the crime of robbery on Nov. 24, 1972." *Id.* at 378 (emphasis deleted). The second information in *Beamon* alleged the previously proven date and was dismissed on double jeopardy and collateral estoppel grounds. This was affirmed by the Third District Court of Appeal. *State* v. *Beamon,* 302 So.2d 208 (Fla. 3d DCA 1973). In quashing that decision this Court noted that double jeopardy will bar subsequent prosecutions only where:

> (1) [T]here was a former prosecution in the same state for the *same offense;* (2) that the same person was in jeopardy on the first prosecution; (3) that the parties are identical in the same prosecution; and (4) that *the particular offense* on the prosecution of which the jeopardy attached was such an offense as to constitute a bar.

298 So.2d at 379-80 (citations omitted and emphasis in original). We specifically found that since the variance between the dates was material, thereby justifying an acquittal in the first prosecution, the *offense* charged in the second information was not the "same offense" and thus double jeopardy did not apply.

Florida's test for determining whether successive prosecutions impermissibly involve the same offense is based upon the sufficiency of the allegations in the second information with regard to a conviction of the offense charged in the first. If the facts alleged in the second information, taken as true, would have supported a conviction of the offense charged in the prior information, the offenses are the same and the second prosecution is barred. *Bizzell* v. *State,* 71 So.2d 735 (Fla. 1954). This is similar to the federal standard which allows the second prosecution where conviction of either offense requires proof of a fact which is not required by the other. *Blockburger* v. *United States,*

284 U.S. 299 (1932). Under the facts of the cases at bar, we need not delve into the distinctions between the two tests. *See generally* Note, *Twice in Jeopardy,* 75 Yale L.J. 262, 269-75 (1965); *Ennis* v. *State,* 364 So.2d 497 (Fla. 2d DCA (1978).

Tests for identity of offenses were formulated to prevent the unjust results occurring under the rules of common law pleading which made the slightest variation between the pleadings and proof fatal to the prosecution. A plea of former acquittal barred reprosecution; thus the guilty were permanently freed from further prosecution on the basis of technicalities of pleading. *See The King* v. *Vandercomb & Abbott,* 2 Leach 708, 168 Eng. Rep. 455 (1796), *cited in* Note, 75 Yale L.J. at 271, *and* Note, *Double Jeopardy in Florida,* 2 U. Fla. L. Rev. 250, 253 (1949). Similar injustice will result if a defendant who clearly is acquitted on the basis of a variance may later assert that the variance wasn't really material and that the offenses differentiated thereby are one and the same. *State* v. *Beamon.* In *State* v. *Bentley,* 81 So.2d 750 (Fla. 1955), this Court distinguished situations such as the ones at bar from one in which the defendants went to trial on the first charge and were acquitted by a jury in spite of a variance between the pleading (larceny of a cow) and proof (larceny of a calf). *See Driggers* v. *State,* 137 Fla. 182, 188 So. 118 (1939). In the latter instance "from all that appears in the record, the jury could have found [the defendants] not guilty on the actual merits of the case." 81 So.2d at 751. *See also LeRea* v. *Cochran,* 115 So.2d 545 (Fla. 1959), *cert. denied,* 362 U.S. 946 (1960).

Defendant Katz argues that since he did not affirmatively seek a judgment of acquittal based upon the variance, the *Beamon* rationale should not be applied to prevent him

from denying its materiality when the second, accurate information was filed. We disagree. The import of the *Beamon, Bentley* and *Driggers* decisions is that if a variance is substantial enough to form the basis for an acquittal, it must be deemed a material variance. The trial judge acted *sua sponte* to dismiss the first *Katz* information, but the acquittal was unquestionably founded upon the discrepancy between a 1977 Buick and a 1975 Chevrolet. The fact that the trial judge instead of defendant discerned and acted upon the flaw in the information does not alter the underlying principle.

Assuming the variance was material, defendant Katz argues the state may not relitigate the issue under principles of collateral estoppel. *Ashe* v. *Swenson,* 397 U.S. 436 (1970). This doctrinal extension of the double jeopardy prohibition applies to bar relitigation between the same parties of issues actually determined at previous trial. In *Ashe* the defendant was acquitted of robbing a poker game on the basis of identity, *i.e.,* he was not one of the robbers. Since his identity as a robber of that game had been resolved in his favor, the state was collaterally estopped from relitigating his identity as a robber by reprosecuting for robbery of a different poker player. *See State* v. *Powell,* 314 So.2d 787 (Fla. 2d DCA 1975). In *Katz* the defendant was cleared only of stealing a 1977 Buick. The issue of whether he stole anything else, *e.g.,* a 1975 Chevrolet, was never resolved in his favor and may be relitigated. *See State* v. *Nocon,* 352 So.2d 910 (Fla. 2d DCA 1977), *cert. denied,* 367 So.2d 1125 (Fla. 1979).

Nor is reprosecution barred under the facts in *Witherspoon,* where the defendant actively sought and obtained a judgment of acquittal on the basis of a material variance between the allegations and proof. Judge Hubbart lucidly explained why Witherspoon's situation is legally indistin-

guishable from Beamon's, and we need only paraphrase the facts of each case to highlight his legal analysis.

Witherspoon was charged with grand larceny on a certain day at "approximately 8:00 P.M." When the first two state witnesses testified that the crimes had occurred "just about nightfall" or "at dusk," Witherspoon moved for a judgment of acquittal. The court checked with the meteorological society, which related that dusk occurred that day between 5:30 and 6:00 P.M. The court then noted Witherspoon's alibi defense for 8:00 P.M. that day and ordered Witherspoon's acquittal.

In identical circumstances, from a legal point of view, Beamon asked for and received an acquittal of an alleged November 24 robbery when the crime victim initially testified that she was robbed on November 26. There is no thread of legal consistency which would allow the state to recharge Beamon with a November 26 robbery while preventing the state from recharging Witherspoon with a dusk grand larceny.* In each situation the defendant was exonerated because proof of the time of commission of the criminal activity varied materially from the allegation of time for which the defendant had prepared his defense.

Beamon teaches that a defendant under circumstances such as these is estopped to suggest that the variance which was material enough for acquittal is nonetheless imma-

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* The only troublesome aspect of *Witherspoon* is the descriptive phrase in the charging document which says: "to-wit: between 6:00 P.M. 8:00 P.M." The outer limit of 8:00 P.M., obviously, corresponds to the time originally charged as the approximate time of the offense. It is only a characterization of the operative phrase "at dusk", however, and as such is not determinative. Moreover, it inaccurately describes the new charge of a crime committed "at dusk".

terial for a new charge. *See also Stevens* v. *State,* 383 So. 2d 1156 (Fla. 5th DCA 1980); *State* v. *Mayor,* 378 So.2d 1324 (Fla. 3d DCA 1980). That is the rule we now reiterate and apply to Katz and Witherspoon.

The district court decisions are quashed, and these causes are remanded to the district court of appeal with instructions to reverse the orders of the trial judge dismissing the informations.

It is so ordered.

SUNDBERG, C.J., OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur

ADKINS, J., Concurs as to *State* v. *Katz,* and dissents as to *State* v. *Witherspoon.*

BOYD, J., Dissents with an opinion

APPENDIX B

BOYD, J., dissenting.

The two basic purposes of the Double Jeopardy Clauses of the United States and Florida Constitutions are protection against double punishment for a single criminal offense and prevention of successive prosecutions for the same alleged offense. These cases involve the latter purpose. The constitutional protection against twice being placed in jeopardy for the same offense reflects the framers' appreciation of the potential for oppression when the government is allowed successive attempts to prove the commission of a crime.

A "variance" between the pleadings and the proof means a failure by the state to adduce sufficient evidence to prove its accusation. When such a variance calls for a dismissal of the charge, a directed verdict, or a judgment of acquittal, it is the same as if the accused had been acquitted by the jury. The majority reasons that in the instant cases reprosecution under reformed accusatory pleadings is permissible because such new accusations are not for the same offenses the state failed to prove at the earlier trials. But it is only in a highly technical sense that the offenses charged in the new informations can be considered different offenses from those originally charged.

When a jury concludes that the state has failed to prove the commission of a crime, so that the defendant, presumed innocent, must be acquitted, it is possible that at a later time the government, having gathered more evidence, might be able to prove the commission of the crime. In such a situation, the people have an interest in seeing that the guilty defendant is brought to justice and punished. The Double Jeopardy Clause, however, declares that such governmental interest is outweighed by the potential that successive prosecutions may be used to inflict vexation and harassment.

To be accused of crime and subjected to a criminal trial is a devastating ordeal. Even where the accused is acquitted of the crime, the burdens of the experience may and often do involve severe embarrassment, psychological damage, and financial ruin. Therefore, the Double Jeopardy Clause demands that the government be allowed but one opportunity to prove a criminal accusation.

It is fundamental to the concept of ordered liberty under a legitimate government that a person may not be condemned to criminal punishment without a fair trial. Various provisions of the Bill of Rights of the United States Constitution and the Declaration of Rights of the Florida Constitution secure the procedural rights that ensure that criminal trials will be fair. These procedural rights are prerequisites to criminal conviction and recognize the awesome power of government to deprive persons of life, liberty, or property. But the Double Jeopardy Clause goes further and recognizes the importance of the power of government to *accuse* persons of crime.

One of the most awesome powers exercised by officials of the state is the power of our state attorneys and grand juries to institute criminal proceedings by accusing a person of the commission of a crime. The exercise of such authority sets in motion the machinery of the criminal justice system and brings the prosecutorial resources of the state to bear upon an individual. The constitutional prohibition against allowing the state a second opportunity to prove the commission of a crime should extend to situations such as the present cases and should be held to require that when accusatory pleadings are being drafted, they be drafted correctly. If the proof at trial fails to sustain the allegations, retrial should no more be permitted on the basis of corrected allegations than it is on the basis of augmented proof.

The decisions of the district court of appeal were correct and should be approved. I dissent.

APPENDIX C

SUPREME COURT OF FLORIDA

Thursday, September 24, 1981

STATE OF FLORIDA,

Petitioner, CASE NO. 57,227

v. District Court of Appeal, 3d District - No. 78-1273

MARTIN KATZ,

Respondent.

• • • • • • • • •

STATE OF FLORIDA,

Petitioner, CASE NO. 56,169

v. District Court of Appeal, 3d District - No. 77-1892

ALFRED WITHERSPOON,

Respondent.

CONSOLIDATED CASES

• • • • • • • • •

Upon consideration of the Petition for Rehearing filed in the above styled cause by the attorneys for Respondent MARTIN KATZ,

IT IS ORDERED that said Petition be and the same is hereby denied.

SUNDBERG, C.J., ADKINS, OVERTON, ALDERMAN and McDONALD, JJ., concur BOYD, J., dissents

Upon consideration of the Motion of Respondent MARTIN KATZ for Stay of Mandate Pending Application for Certiorari to the Supreme Court of the United States, IT IS ORDERED that said Motion is granted and proceedings in this Court, in the District Court of Appeal, Third District, and in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, are hereby stayed to and including October 26, 1981, to allow Respondent MARTIN KATZ to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:

By: */s/ Tanya Carroll*
Deputy Clerk

Sid J. White
Clerk, Supreme Court

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

January Term, A.D. 1979

THE STATE OF FLORIDA,

Appellant,

vs.

Case No. 78-1273

MARTIN KATZ,

Appellee.

Opinion filed June 26, 1979.

An Appeal from the Circuit Court for Dade County, Paul Baker, Judge.

Janet Reno, State Attorney and Ira N. Loewy, Assistant State Attorney, for appellant.

Henry Gonzalez, for appellee.

Before Pearson, Hendry and Hubbart, JJ.

Per Curiam.

The State of Florida brings this appeal from an order dismissing an information against defendant Martin Katz. The information was dismissed on the ground that Katz's trial upon a prior information and a finding therein of not guilty collaterally estopped the State from the prosecution of the second information.

Defendant Katz was charged in the first information with burglary of a conveyance, aggravated assault and possession of burglary tools. The count charging the defendant with burglary of a conveyance alleged, in pertinent part, that:

> ". . . MARTIN KATZ on the 16th day of November, 1977 . . . did unlawfully enter or remain in a certain conveyance, to-wit: A 1977 BUICK AUTOMOBILE, the property of MIKE ALBURY, with the intent to commit an offense therein, to-wit: THEFT . . ."

A non-jury trial took place on April 4, 1978. Testimony was presented showing that the automobile at which defendant was discovered and into which he had broken was a 1975 Chevrolet belonging to Michael Albury. The 1977 Buick described in the information, in fact, belonged to the defendant's wife and was the vehicle in which the defendant and his companions attempted to escape.

At the close of all the evidence, defense counsel moved for dismissal of all charges. The court expressed confusion over the discrepancy between the allegation of a 1977 Buick contained in the information and the proof of a 1975 Chevrolet presented at trial. The State advised the court that the information contained in the State's file had been corrected to reflect that the subject of the burglary was a 1975 Chevrolet. However, the official information in the court's file had not been amended or corrected, nor had notice been given to the defendant or his attorney of a motion to amend. Consequently, the court, noting that the defendant was charged with "breaking into his own car," found defendant not guilty. The court also found the defendant not guilty of the other counts charged in the information.

Thereafter, the State filed a new information, charging the defendant with burglary of a conveyance and grand theft. The first count alleged, in pertinent part, that:

> ". . . MARTIN KATZ on the 16th day of November, 1977 . . . did unlawfully enter or remain in a certain conveyance, to-wit: A 1975 CHEVROLET AUTOMOBILE, the property of MIKE ALBURY, with the intent to commit an offense therein, to-wit: THEFT . . ."

In the second count, the defendant was charged with theft of that same automobile.

The defendant filed a "Motion for Collateral Estoppel" and a supporting memorandum of law in which he alleged that the State was barred from prosecuting him for burglary and theft of the Chevrolet by virtue of his acquittal in the prior case heard on April 4, 1978. The court agreed and, in an order rendered June 12, 1978, dismissed all charges against the defendant based upon the doctrine of collateral estoppel announced in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). This appeal followed.

The State contends that it was error for the trial judge to dismiss the second information because the only charge of which the defendant was acquitted was burglary of a 1977 Buick and that the charge of stealing the 1975 Chevrolet was a new charge. The State relies upon the holding in State v. Beamon, 298 So.2d 376 (Fla. 1974); and State v. Bentley, 81 So. 2d 750 (Fla. 1955).

We hold that the decision of the trial court must be affirmed on authority of the principles stated in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); and Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970).

While we recognize here that the distinction is close, we believe that one exists. In the Beamon case, the Supreme Court found that a difference in the day alleged for the crime constituted a different crime for which the defendant could be prosecuted. In the present case, however, the second information was obviously tailored to meet the proof that had been offered at the first trial and constituted only a change in the description of the automobile alleged to have been stolen.

Affirmed.

HUBBART, Judge (dissenting)

I must respectfully dissent. I would reverse the order under review and remand the cause to the trial court for further proceedings under the authority of State v. Beamon, 298 So.2d 376 (Fla. 1974), and State v. Bentley, 81 So.2d 750 (Fla. 1955).

In my view, the court makes the same error under the same controlling facts as this court made in State v. Beamon, 302 So.2d 208 (Fla. 3d DCA 1973), which decision was subsequently quashed in State v. Beamon, 298 So.2d 376 (Fla. 1974), and as the trial court made in State v. Bentley, 81 So.2d 750 (Fa. 1955). That error is in concluding that the first information upon which a judgment of acquittal was entered charges "the same offense" which the defendant is presently charged with under the second information, and that, therefore, the defense of double jeopardy or collateral estoppel is applicable to bar the second information. In point of fact, two different offenses are charged in the above two informations involving two entirely separate cars thereby rendering the defense of double jeopardy and collateral estoppel ineffective.

In the first information, the defendant was charged with the burglary of a 1977 Buick automobile, the property of Mike Albury. He was tried and acquitted on this charge. He was thereafter charged with the burglary of a 1975 Chevrolet automobile, the property of Mike Albury. These two informations charge two separate crimes and an acquittal on the first information cannot bar a prosecution on the second information under the defense of double jeopardy or collateral estoppel. Different offenses, not the same offense, are charged in the two informations.

This result is not changed by the fact that the proofs at the first trial showed that the defendant owned the 1977 Buick automobile in question and had burglarized a 1975 Chevrolet automobile. The first information charged the defendant with burglary of the 1977 Buick and an acquittal thereon can only be an acquittal as to the burglary of that particular automobile. The issue of whether the defendant burglarized the 1975 Chevrolet on the same day was neither litigated nor determined at the first trial. I entirely agree with the court that the second information was obviously tailored to meet the proof that was offered at the first trial, but that fact has no legal significance as the issues determined at the first trial in no way involved whether the defendant had burglarized the 1975 Chevrolet. As such, the doctrine of double jeopardy or collateral estoppel cannot bar a prosecution of the defendant for the burglary of the 1975 Chevrolet.

In State v. Beamon, 298 So.2d 376 (Fla. 1974), the Supreme Court held that an acquittal on a robbery occurring on one date did not bar a subsequent information charging a robbery of the same victim on a different date. The defense of double jeopardy and collateral estoppel was held ineffective to bar the second prosecution. This result was in no way changed by the fact that at the first trial it was established that the robbery in question had occurred on the date subsequently charged in the second information. Similarly, in the instant case, it can make no difference that the proofs at the first trial showed that the defendant had burglarized the automobile subsequently charged in the second information.

In State v. Bentley, 81 So. 2d 750 (Fla. 1955), the Florida Supreme Court held that an acquittal on the charge of larceny of a cow on a certain date did not bar a subsequent prosecution for the larceny of a bull, property of the

same person, occurring on the same date. The defense of double jeopardy was held ineffective to bar the second prosecution. This result was in no way changed by the fact that at the first trial it was established that the defendant stole a bull, rather than a cow, belonging to the complaining witness. Similarly, in the instant case, it can make no difference that the state established at the first trial that the defendant burglarized the automobile subsequently charged in the second information.

I would reverse.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 8 1982
ALEXANDER L. STEVAS,
CLERK

CASE NUMBER 81-763

in the Supreme Court of the United States

OCTOBER TERM, 1981

MARTIN KATZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

JIM SMITH
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IRA N. LOEWY
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COUNSEL FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION OF THE SUPREME COURT OF FLORIDA BELOW WHICH HELD THAT WHERE PETITIONER AT HIS PRIOR TRIAL OBTAINED A DIRECTED VERDICT OF ACQUITTAL ON THE SOLE GROUND THAT THE VARIANCE BETWEEN THE INFORMATION AND THE PROOF WAS MATERIAL, HE CANNOT, ON HIS SUBSEQUENT PLEA OF FORMER JEOPARDY, ALLEGE OR PROVE THAT IT WAS NOT MATERIAL?

PARTIES

The parties in the Supreme Court of Florida were the Petitioner, Martin Katz; Alfred Witherspoon; and the Respondent, the State of Florida. Witherspoon, who was co-respondent in the Florida Supreme Court, has also filed a petition for writ of certiorari in this Court, which was docketed on September 28, 1981, Case No. 81-5496, and to which the State of Florida responded, at the request of this Court, on December 11, 1981.

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OPINION BELOW

The full opinion of the Supreme Court of Florida is officially reported at 402 So.2d 1184 (Fla. 1981).

JURISDICTIONAL STATEMENT

The jurisdictional requisites are set forth in the petition.

STATEMENT OF THE CASE

The respondent accepts the petitioner's statement of the case, subject to the following additions:

When the proof at the trial showed that Petitioner Katz had been observed burglarizing a 1975 Chevrolet which was owned by one Mike Albury and that the 1977 Buick which he was charged with burglarizing actually belonged to petitioner's wife and was the car in which he had attempted to flee the scene, the prosecutor argued to the Court that a judgment of acquittal should not be granted because the petitioner was not prejudiced by the variance.[1] The Court then asked defense counsel whether he had ever been noticed by the State that the Information was going to be amended or changed to reflect the proper charge and defense counsel responded, "No, sir." The Court then directed a judgment of acquittal specifically on the ground that the petitioner had been charged with "breaking into his own car."

---

[1]The prosecutor initially advised the Court that the State's copy of the Information had been corrected and that he had assumed that the one in the Court File had also been changed. The Court, however, reviewed the Court File which disclosed that no motion to amend had ever been made. (R. 76).

ARGUMENT

PETITIONER DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION WARRANTING REVIEW.

The question presented for review by the petitioner in this case poses even less of a substantial federal question than that found not to warrant the exercise of the certiorari jurisdiction of this Court in *Duncan v. Tennessee*, 405 U.S. 127 (1972), a case which is materially identical to the one at bar. The defendants in *Duncan* were brought to trial on an indictment charging armed robbery "by the use of a deadly weapon, to-wit: A Gun to-wit: a pistol . . ." After the jury was selected and sworn, the indictment read, and a plea of not guilty entered in the defendant's behalf, the State's first witness testified that a "22 rifle" rather than a pistol had been used in the commission of the offense. Defense counsel immediately objected to the variance and the prosecutor then informed the court that the word "pistol" was a mistake, and that the State would move for a directed verdict of acquittal on the ground of erroneous indictment. This motion was made and was granted by the trial judge.

Some eight months later, defendants were again brought to trial for the same armed robbery, under a new indictment which now correctly described the weapon as a "22 caliber rifle." Defendants' plea of double jeopardy was overruled by the trial court, and they were convicted and sentenced to 10 years imprisonment. The State Court of Criminal Appeals sustained defendants' double jeopardy claim on appeal, but the Supreme Court of Tennessee reversed. *State v. Brooks*, 224 Tenn. 712,

462 S.W.2d 491 (1970). In affirming the trial court's rejection of defendants' double jeopardy plea, the Tennessee Supreme Court made the following cogent observations:

> "It is a sacred principle of our law that no man shall be placed in jeopardy twice for the same offense. Therefore, where a man has been pronounced not guilty on a valid indictment, he cannot be again indicted upon a charge of having committed the same supposed crime. But, while we guard with great care this rule of defense, so consonant with justice and reason, we must at the same time with equal care see that it is not perverted from its intended purposes and made to protect from punishment those whom the law never designed should fall within its operation. To entitle a prisoner to the benefit of the plea of autrefois acquit, it is necessary that the crimes charged in the last bill of indictment be precisely the same with that charged in the first, and that the first bill of indictment is good in point of law. The true test by which the question whether such a plea is a sufficient bar may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first".
>
> * * *
>
> "No matter how irregular the proceedings have been, one who has been tried in a competent court and acquitted on the merits cannot be

> placed on trial for the same offense; but the acquittal must have been on the merits; and the rule does not apply where the acquittal was for a material variance" . . . "The effect of a material variance between the allegations of the indictment and the proof is to entitle the accused to an acquittal on the particular indictment, but he is still liable to be tried for his crime; and, if accused is acquitted by direction of the court on the ground of material variance, he cannot plead acquittal as a bar to a second prosecution for he has never been in jeopardy, and when tried on the new indictment the crime then alleged is not the same crime as in the former indictment.
>
> *Id.* at 713, 462 S.W.2d at 493

After having initially granted certiorari, *Duncan v. Tennessee*, 404 U.S. 821 (1971), this Honorable Court, over the dissent of three of its members, dismissed the writ of certiorari as improvidently granted. *Duncan v. Tennessee*, 405 U.S. 127 (1972). The Court stated:

> We granted certiorari in this case, 404 U.S. 821, 92 S.Ct. 121, 30 L.Ed.2d 49, to consider questions seemingly presented under the constitutional guarantee against double jeopardy. After briefing and oral argument, it now appears that those questions are so interrelated with rules of criminal pleading peculiar to the State of Tennessee, the constitutionality of which is

not at issue, as not to warrant the exercise of the certiorari jurisdiction of this Court.

Id.

Subsequently, this Court denied review of the Florida Supreme Court's decision in *State v. Beamon*, 298 So.2d 376 (Fla. 1974), a case which was substantially identical to *Duncan* and which was the basis for the decision of the Supreme Court of Florida in the instant case. *Beamon v. Florida*, 419 U.S. 1124 (1975).

In the case at bar, the petitioner was initially erroneously charged with the burglary of his own car, a 1977 Buick. When the proof at trial showed that he had been caught burglarizing a 1975 Chevrolet belonging to one Mike Albury, the Court found this to be a *different charge* than the one specified in the Information, rebuffed the prosecutor's effort to amend the Information to conform to the proof because defense counsel represented that he had not been given notice of this new charge, and specifically found the petitioner not guilty of the charge of "breaking into his own car." The only difference between this case and *Duncan v. Tennessee, Supra*, is that in *Duncan*, it was the prosecutor who moved for and was granted a directed verdict of acquittal on the ground of erroneous indictment, over the defendant's objection, whereas in the case at bar, it was with the concurrence of defense counsel that the Court found the variance between the charged burglary of a 1977 Buick and the proof of burglary of a 1975 Chevrolet to be material. Thus, this case falls squarely within the Florida rule of estoppel which holds that a defendant who obtains a directed verdict of acquittal on the sole ground that the variance between the Information and

the proof was material is estopped from suggesting that it is nonetheless immaterial for a new charge.[2] Accordingly, the Florida Supreme Court's judgment that the burglary of a 1977 Buick, charged in the first Information and the burglary of a 1975 Chevrolet charged in the second Information are different offenses does not present this Court with a federal question significant enough to warrant the exercise of its certiorari jurisdiction.

---

[2]This rule is similar to the rule announced in *Lee v. United States*, 432 U.S. 23 (1977), wherein this Court held that where a defendant obtains a midtrial dismissal of an Information based upon the failure to adequately allege all the elements of the charged crime, he could be retried upon a properly redrafted Information.

CONCLUSION

At his trial, the petitioner was acquitted of the charge of burglary of a 1977 Buick precisely because the proof presented by the State established that he was guilty of a different offense. Under these circumstances, the Florida Supreme Court's holding that the petitioner is estopped to suggest that he is twice being put in jeopardy for the same offense does not raise a substantial federal question. For the same reasons that this Court denied review in *Duncan v. Tenessee, Supra*, and *Beamon v. Florida, Supra*, it is respectfully submitted that this Court should deny jurisdiction in this case.

Respectfully submitted,

JIM SMITH
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Tallahasse, Florida

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1351 Northwest 12th Street
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(305) 547-7093

By: _____
IRA N. LOEWY
Assistant State Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Julius Lucius Echeles, Esquire, 35 East Wacker Drive, Chicago, Illinois 60601; and Bruce Rosenthal, Esquire, Assistant Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125, on this _____ day of January, 1982.

IRA N. LOEWY
Assistant State Attorney